



SB 5/SFCS consolidates criminal forfeiture proceedings by delineating the procedures, standards, deadlines and assessed costs to be followed by the involved agencies. Property subject to forfeiture by law enforcement agencies will be restricted to only those cases where a conviction is obtained. All revenue from the forfeiture of seized property will revert to the general fund of the governing body of the seizing law enforcement agency to be used for drug prevention and education programs, for other substance demand-reduction initiative or for enforcing narcotics violations except for forfeitures of property arising from the preservation of cultural properties or game protection laws. Cases in which the courts find in favor of the defendants will require the law enforcement agency that seized the property to pay that defendants court costs and attorney's fees.

Sec. 1. and 2. SB 5/SFCS provides uniform standards and procedures for the seizure and forfeiture of property used in the commission of a crime. SB 5/SFCS applies to seizures, forfeitures and dispositions of property subject to forfeiture pursuant to laws that specifically apply to the Forfeiture Act and other seizures, forfeitures and dispositions but only to the extent that the procedures in the Forfeiture Act are consistent with the procedure in the other laws.

Sec. 3. The definition section contains definitions of conviction, crime, law enforcement officer, law enforcement agency, owner, property, property subject to forfeiture and secured property.

Sec. 4. Property may be seized pursuant to an order issued by the district court based on a sworn application of a law enforcement officer and after a finding that the property is subject to forfeiture, that there is a substantial probability the state will prevail on the issue of forfeiture and a concern that the property will be destroyed or removed if not seized and that seizing the property outweighs the hardship to the party of interest. Seizure other than of a residence or business can take place without a court order if the seizure is incident to an arrest, the property was subject to a prior judgment, and there is probable cause to believe the property is forfeitable and delay would frustrate the procedure.

Sec. 5. Within thirty days following the seizure, the state shall file a complaint of forfeiture or return the property. The requirements of the complaint and service are described. The complaint shall be served upon the person from whom the property was seized and, if that person is a criminal defendant, upon the person's attorney of record and upon all persons known or reasonably believed by the state to claim an interest in the property. A copy of the complaint shall also be published no less than three times in a newspaper of general circulation in the district of the court having jurisdiction.

Sec. 6. Claims to the property shall be filed within thirty days as an answer. Jurisdiction and venue for the forfeiture proceeding is in the same court where the underlying criminal matter has jurisdiction and venue. The forfeiture shall be brought in the same proceeding as the criminal matter and presented to the same tier of fact provided that the two issues should be bifurcated and the criminal rules apply to the criminal prosecution and the civil rules apply to the forfeiture.

The state must prove by clear and convincing evidence that the person charged with the crime owns the property or the forfeiture is dismissed, the property returned, the owner awarded costs and reasonable attorney fees and he or she is not subject to storage costs. Costs and attorney fees awarded shall be paid out of the general fund of the agency's governing body.

Illegal property should not be returned. The court shall enter a judgment of forfeiture if it determines by clear and convincing evidence that the property is subject to forfeiture, the criminal prosecution results in a conviction of the owner, the value of the property does not unreasonably exceed the pecuniary gain derived or sought to be derived by the crime, the pecuniary loss caused or the value of the convicted owner's interest in the property.

If the criminal defendant is represented by the PDD, they may also represent the client in the forfeiture proceedings.

Sec. 7. Monies forfeited or monies from sale of forfeiture assets go, first, for storage costs or the costs of a sale; second, to restitution; third, to the general fund of the governing body of the seizing law enforcement agency, except for forfeiture under Chapter 17 that will go to the game protection fund in an amount equal to the prosecution costs and then to the general fund and forfeiture under Chapter 18, article 6, that will go to restore affected cultural property with the net amount going to the general fund. Any property interest forfeited to the state is subject to the interest of a secured party unless the secured party knew of the crime. Special rights are given to co-owners of the property depending on whether they knew of the crime.

Sec. 8. This section sets out how property seized is to be kept. Seized currency shall be deposited with the district court clerks and put in an interest bearing account. Other property shall be placed under seal and removed to a place designated by the district court or held in the custody of the seizing agency.

Amendments are made to already existing forfeiture sections throughout the statute, deleting current procedures.

### Significant Issues

The AG states that SB 5/SFCS draws together a number of forfeiture provisions appearing in various statutory chapters by setting forth a uniform procedure for police and court action to remove property involved in criminal activity. It increases the burden on law enforcement officers to obtain court orders prior to seizure or to have probable cause to support a seizure.

The bill narrows the definition of property subject to forfeiture by requiring the value of the property to be measured against the "pecuniary" value of the relevant crime. It is not clear, for example, how the value of wildlife would be measured from a "pecuniary" perspective, or whether shooting from a motor vehicle without causing sufficient "pecuniary" damage will insulate a vehicle from forfeiture.

The measure grants costs and attorneys fees to a property owner if the state fails to meet its burden of showing by "clear and convincing" evidence that the person charged with the crime is the owner of the property. The costs and attorneys fees are to be paid out of the "general fund of the agency's governing body." There is no current provision requiring law enforcement agencies to pay costs and attorneys fees under these circumstances.

The bill directs the proceeds of most forfeited property, after payment of expenses and restitution to victims, to the general fund "of the governing body of the seizing law enforcement agency" to be used for drug treatment, prevention and education programs or narcotics law enforcement. Pro-

ceeds from violations of laws pertaining to shooting at or from motor vehicles, unlawful handgun possession, unauthorized sound recordings, illegal gambling enterprises, racketeering, computer crimes and alcohol related offenses would, therefore, be directed solely to drug-related purposes. The state constitution indicates a preference for directing forfeiture proceeds to the school fund.

The AG further note that because of the state constitutional double jeopardy concerns discussed in Nunez, the legislature would need to express an intent to include forfeiture as part of the punishment for specific crimes, or a constitutional amendment would be necessary to permit separate proceedings for criminal convictions and related forfeitures. The appellate courts have not yet fully defined the procedural forms that will be considered acceptable under our state constitution. This bill codifies the single proceeding required by Nunez and delineates the application of criminal procedure rules and civil procedure rules to the respective criminal and forfeiture portions of the bifurcated proceeding.

### **FISCAL IMPLICATIONS**

Individual state, municipal and law enforcement agency budgets will be affected when the courts award large attorneys fees in those cases in which the forfeiture cases are unsuccessful.

The PDD indicates that they will have to handle forfeiture representation concurrent with criminal representation, which will require additional in-house staff as well as contract counsel with expertise in civil matters.

The AOC states that new hearings also have the potential to increase caseloads in the courts, thus requiring additional resources to handle the increase.

The AG believes that there may be an increased cost to them because of additional appellate litigation.

### **ADMINISTRATIVE IMPLICATIONS**

The AOC claims that there will be an administrative impact to the courts as a result of new hearings and new mandates such as requiring the courts to deposit any cash.

The PDD will have an increased workload that will require additional administrative resources.

### **OTHER SUBSTANTIVE ISSUES**

The AG notes that although SB 5/SFCS refers to real property, the section defining property subject to forfeiture refers to state law outside of the act. There is no provision in current law permitting forfeiture of an individual's home

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